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No. 85-1650

In the Supreme Court of the United States

OCTOBER TERM, 1985

N.O.C., INC., t/a NOBLE OIL COMPANY, PETITIONER

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the determination by the Administrator of the Environmental Protection Agency (EPA) that one of Noble Oil Company's storage tanks was a "PCB Container" was supported by substantial evidence.

2. Whether an oil company could be fined for violating EPA regulations governing the disposal, storage, and marking of "PCB Containers" after the United States Court of Appeals for the District of Columbia Circuit held invalid parts of a different set of EPA regulations, but stayed its mandate.

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OPINIONS BELOW

The court of appeals affirmed the decision of the Administrator by order (Pet. App. 118a-119a) reported at 782 F.2d 1030 (Table), without opinion. The decision of the Administrator (Pet. App. 106a-115a) and the decisions of the administrative law judge (Pet. App. 1a-35a, 36a-105a) are unreported.

JURISDICTION

The judgment order of the court of appeals (Pet. App. 118a-119a) was entered on December 11, 1985. The petition for a writ of certiorari was filed on March 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. (& Supp. II) 2601-2629, Congress singled out a

group of highly toxic chemical substances known as polychlorinated biphenyls (PCBs) for stringent regulatory control by the Environmental Protection Agency (EPA) (see *Environmental Defense Fund* v. *EPA*, 636 F.2d 1267, 1270-1272 (D.C. Cir. 1980)). Section 6(e)(1) of TSCA required EPA to issue regulations to ensure the safe disposal and proper marking of PCBs (15 U.S.C. 2605(e)(1)). These regulations, known as the "disposal and marking regulations," were initially promulgated on February 17, 1978 (43 Fed. Reg. 7149). They specified the manner in which PCBs may be disposed of (*e.g.*, high temperature incineration or chemical waste landfills approved by EPA). They also imposed certain requirements for the storage of PCBs, including (1) marking "PCB Containers" with a warning label; (2) maintaining records of the dates and quantities of PCBs added to the containers; and (3) having a Spill Prevention Control and Countermeasure Plan in effect (*ibid.*). TSCA also required EPA to issue regulations to phase out the manufacturing, processing, distribution, and use of PCBs (15 U.S.C. 2605(e)(2) and (3)). These regulations, known as the "ban regulations," were promulgated on May 31, 1979 (44 Fed. Reg. 31513). When EPA issued the ban regulations, it also reissued the disposal and marking regulations, in order to clarify the relationship between the two sets of regulations (*id.* at 31514).[1]

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[1]Both sets of regulations were codified together at 40 C.F.R. Pt. 761 (1980). The Part 761 regulations were organized in the following manner. Subpart A contained definitions and other provisions of general applicability. Subparts B and C, which were the "disposal and marking regulations," set out detailed requirements for the disposal and marking, respectively, of PCBs, pursuant to Section 6(e)(1) of TSCA. Subpart D, which was the "ban regulations," contained the prohibitions and exceptions developed to implement Section 6(e)(2) and (3) of the TSCA. Finally, Subpart E contained detailed technical standards governing disposal, storage, marking, recordkeeping, and other matters.

The PCB regulations were recodified and renumbered in 1982, and amended in certain respects in 1984. We refer to the regulations as they were codified in 1980, the relevant time period for the present case.

When the disposal and marking regulations were first promulgated, they applied to, among other things, "PCB Mixtures"; these were defined as any mixtures containing PCBs in a concentration of 500 parts per million (ppm) or greater (43 Fed. Reg. 7151, 7157 (1978)). When EPA reissued the disposal and marking regulations, it lowered this regulatory threshold to 50 ppm. EPA also used a 50 ppm threshold for the ban regulations. In codifying the two sets of regulations, EPA used a common definition of "PCB Items" as any of a number of items containing concentrations of 50 ppm or greater. 44 Fed. Reg. 31544 (1979) (codified at 40 C.F.R. 761.2(x) (1980)).[2]

2. In 1980, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in a case involving an environmental group's challenge to the ban regulations (*Environmental Defense Fund* v. *EPA*, 636 F.2d 1267 (D.C. Cir. 1980)). The court noted explicitly that "EDF [did] not challenge the Disposal Regulations" (*id.* at 1269 n.3).[3] With respect to the ban regulations, the court

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[2]40 C.F.R. 761.2(x) (1980) was contained in the definitions section of Subpart A. It defined PCB item as "any PCB Article, PCB Article Container, PCB Container, or PCB Equipment, that deliberately or unintentionally contains or has as a part of it any PCB or PCBs at a concentration of 50 ppm or greater."

[3]The court stated (636 F.2d at 1269 n.3 (emphasis added)):

> EDF challenges the regulations, promulgated under § 6(e)(2) and (3) of the Act, 15 U.S.C. § 2605(e)(2) & (3) (1976), governing the manufacture, processing, distribution, and use of PCBs—*the so-called Ban Regulations*. *See* 44 Fed.Reg. 31,542-58 (1979) (to be codified in 40 C.F.R. pt. 761). *EDF does not challenge the Disposal Regulations*, issued pursuant to § 6(e)(1) of the Act. EPA issued the final Disposal Regulations over a year before the Ban Regulations. *See* 40 C.F.R. pt. 761 (1978), 43 Fed.Reg. 7,156-64 (1978). EPA later reissued the Disposal Regulations with slight modification along with the final Ban Regulations. *See* 44 Fed. Reg. 31,542-58 (1979).

ruled, among other things, that a regulatory threshold as high as 50 ppm was not supported by the record. The court relied heavily on EPA's own finding that "*any* exposure to PCBs may have adverse effects" (*id.* at 1282 (emphasis added; footnote omitted)).

Because the parties jointly moved for stay of mandate, the court's mandate did not issue. The initial stay was for 18 months. "If the [c]ourt's mandate had issued, making effective immediately the part of its [*Environmental Defense Fund*] decision that overturned the fifty ppm threshold, the broad prohibitions of Section 6(e) would have applied to PCBs in *any* concentration" (46 Fed. Reg. 27615 (1981) (emphasis added)).

3. Noble Oil Company (Noble), located in Vincentown, New Jersey, is in the business of buying and selling waste oils, primarily motor oils (Pet. App. 8a). On January 19, 1981, EPA issued an administrative complaint under Section 16 of TSCA, 15 U.S.C. 2615,[4] against Noble for violations of the PCB disposal and marking regulations. Specifically, EPA charged that Noble maintained a 10,000-gallon underground tank that was a "PCB Container." It was undisputed that Noble did not mark the tank as a "PCB Container" as required by 40 C.F.R. 761.20 (1980), have a Spill Prevention Control and Countermeasure Plan as required by 40 C.F.R. 761.42(c)(7)(ii) (1980), or maintain records of the quantities and dates of PCB additions to the container as required by 40 C.F.R. 761.42(c)(8) (1980) (Pet. App. 5a-6a, 12a). A hearing on the complaint was held before an administrative law judge (ALJ). The ALJ concluded that a sample of waste oil drawn from one of Noble's

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[4]Section 16(a) of TSCA, 15 U.S.C. 2615(a), provides that any person who violates a provision of Section 15 of TSCA, 15 U.S.C. 2614, shall be liable for a civil penalty. Section 15 of TSCA provides, among other things, that it is unlawful for any person to fail to comply with any rule issued under Section 6 of TSCA, 15 U.S.C. 2605. The PCB regulations were issued under Section 6.

underground storage tanks contained PCBs in a concentration of 76 ppm; that the tank was a "PCB Container"; and that Noble committed each of the violations with which it was charged (*id.* at 1a-35a). He assessed a total of $40,000 in civil penalties against Noble for the violations (*id.* at 30a-35a).

The ALJ's decision addressed Noble's argument that EPA had not proven that Noble's storage tank was a "PCB Container." Noble had argued that EPA had not complied with certain regulations, 40 C.F.R. 761.10(g) (1980), in taking the sample from Noble's tank and that therefore the sample was not a representative sample. The ALJ concluded that Noble's argument was unavailing because 40 C.F.R. 761.10(g) (1980) did not apply to the sample taken (Pet. App. 20a-22a). Noble had also contended that intraliquid stratification accounted for the presence of a sample of oil with a concentration of 76 ppm. The ALJ stated that, on the record of the case, any such conclusion "would be pure speculation" (*id.* at 28a). The ALJ found that EPA's analysis of the sample was scientifically adequate (*id.* at 28a-30a).

The ALJ also addressed Noble's argument that the decision in *Environmental Defense Fund* v. *EPA, supra*, invalidating as too high the 50 ppm cutoff in the ban regulations, precluded administrative proceedings against Noble under the disposal and marking regulations. He held that this contention was "patently without merit" (Pet App. 15a) because (1) *Environmental Defense Fund* v. *EPA, supra*, had expressly dealt only with the ban regulations; (2) the reasoning of that decision was that the 50 ppm threshold was not stringent enough to satisfy congressional intent; and (3) in any case, the court of appeals had stayed its mandate (Pet. App. 14a-17a).

4. Noble moved to reopen the hearing, and the ALJ denied its motion (Pet. App. 36a-105a). Noble then appealed to the Administrator of the Environmental Protection Agency. The Administrator affirmed the decision below (*id.* at 106a-115a). Stating that all of Noble's arguments on appeal "were raised below and were thoroughly considered and rejected" by the ALJ, the Administrator adopted all of the ALJ's "findings of fact, conclusions of law and reasons therefor" (*id.* at 112a). Noble filed a petition for review of the Administrator's decision in the United States Court of Appeals for the Third Circuit. Six days after oral argument on the petition, the court of appeals issued a judgment order affirming the Administrator's decision (*id.* at 118a-119a). The court of appeals did not issue an opinion.

5. While the administrative proceedings against Noble were pending (after the hearing but before the initial decision), Noble brought an action in federal district court for an injunction against EPA's issuance of a decision in the pending proceeding. *Noble Automotive Chemical & Oil Co.* v. *EPA*, 19 Env't Rep. Cas. (BNA) 1044 (D.N.J. 1982). Noble again argued that the decision in *Environmental Defense Fund* v. *EPA, supra*, effectively invalidated the regulations Noble was charged with violating and precluded the administrative proceedings against Noble. The court dismissed Noble's complaint on the ground that Noble had not exhausted its administrative remedies (19 Env't Rep. Cas. at 1047). The court did examine the merits of Noble's argument, however, and stated that Noble's argument resulted from its "misunderstanding of the effect of the court's decision in *EDF v. EPA*" (*id.* at 1046). The court, like the ALJ, concluded that the decision in *Environmental Defense Fund* v. *EPA, supra*, did not cover the disposal and marking regulations; that the court of appeals had stayed its mandate so that the ban regulations would remain in effect until new ban regulations were issued; and

that, since the court of appeals had reasoned that the 50 ppm threshold for the ban regulations was "not strict enough to satisfy the congressional mandate," it "would be ironic" to allow Noble to escape administrative sanctions (*id.* at 1047). Noble did not appeal.

ARGUMENT

The decision of the court of appeals was correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

1. First, Noble argues that EPA was required to follow certain regulations (40 C.F.R. 761.10(g) (1980)) in taking the sample of oil from Noble's storage tank, and that, because EPA did not follow these regulations, it did not prove that the waste oil in the tank contained PCBs in a concentration of 50 ppm or greater. Noble misstates the regulations.[5]

EPA, of course, is in the best position to interpret its own regulations, and its interpretation of 40 C.F.R. 761.10(g) (1980) is entitled to great deference. "In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Northern Indiana Public Service Co.* v. *Porter County Chapter of Izaak Walton League of America*, 423 U.S. 12 (1975) (per curiam).

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[5]Similarly, in *Yaffe Iron & Metal Co.* v. *EPA*, 774 F.2d 1008 (1985), the Tenth Circuit rejected a company's arguments that samples drawn from its tank and drum were not "representative" and therefore that certain oil was not a "PCB Mixture" and that a certain drum was not a "PCB Container." The court held that the record supported the findings on both questions. *Id.* at 1015-1016.

As the ALJ held (Pet. App. 17a-22a), the regulations at 40 C.F.R. 761.10(g) (1980) had no bearing on EPA's sampling techniques. Section 761.10(g) contained recommended procedures for use by the regulated industry to test oils that it assumed contained PCBs in concentrations between 50 and 500 ppm. In general, 40 C.F.R. 761.10 (1980) provided alternatives to incineration for "PCB Items" that contained PCBs in concentrations below 500 ppm. Section 761.10(g)(2) recommended certain testing procedures for owners or users of waste oil to use in determining whether their waste oil contained more than 500 ppm of PCBs, and thus whether they could use the alternative disposal methods set out in 40 C.F.R. 761.10 (1980). As the ALJ held, 40 C.F.R. 761.10(g)(2) (1980) was "applicable only to * * * waste oils assumed to contain PCBs having a concentration between 50 ppm and 500 ppm" (Pet. App. 22a).

EPA's preamble to the final rule codified at 40 C.F.R. 761.10 (1980) makes this clear: "[t]esting of * * * waste oil from sources that are otherwise *assumed to contain PCBs at a concentration between 50 ppm and 500 ppm* can be performed on samples taken from collection tanks ('batch testing'). This is permitted so that oils from multiple sources can be collected and tested without requiring a separate test of each transformer each time *a disposer wants to evaluate his disposal options.*" 44 Fed. Reg. 31520-31521 (1979) (emphasis added). This regulation provides guidance to disposers who want to evaluate their disposal options, not to those who wish to avoid disposal under Section 761.10 altogether. The available disposal options differ depending on whether the material is in the 50-500 ppm range or is instead above 500 ppm (see 44 Fed. Reg. 31521 (1979)), and Section 761.10(g) recommends a method by which a disposer can determine in which range its material falls. It does not recommend—much less mandate—a particular method to determine whether material is above or below 50 ppm

and whether its disposal must comply with Section 761.10 at all.[6]

Even if we assume arguendo that EPA should have taken a "representative sample" of the contents of Noble's tank rather than a "grab sample," that would not deprive the grab sample of probative value. The Administrator has held (*Robert Ross & Sons*, TSCA Appeal No. 82-4 (EPA Apr. 4, 1984), slip op. 11-13 (footnotes omitted; emphasis added)):

> Although [a] grab sample cannot be regarded as representative of the contents of the tank as a whole, it seems inescapable that the sample, if properly analyzed, is circumstantial evidence that PCBs were added to the tank in concentrations at least as high as those found in the sample, if not higher. Therefore, regardless of the actual PCB concentration level of the tank * * *, a presumption is raised, by the anti-dilution provisions [of Section 760.10(g)], that the contents of the tank contained PCBs at a level of concentration requiring disposal in an approved incinerator. * * * *[T]he presumption that arises from finding the high concentration PCBs in the tank, if unrebutted, * * * alone is a sufficient basis for establishing a violation.*[7]

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[6]There is particularly strong evidence that this interpretation is correct. ALJ Nissen, who Noble claims agreed in another case with its reading of Section 760.10(g) (*Robert Ross & Sons*, TSCA Docket No. V-C-008 (EPA Feb. 1, 1982), slip op. 26-27, aff'd on other grounds, TSCA Appeal No. 82-4 (EPA Apr. 4, 1984)), acknowledged in Noble's case that that reading of the regulation was unsupportable in light of the language of the *Federal Register* preamble quoted above (Pet. App. 25a-26a n.9). Judge Nissen also noted that he had not precisely addressed this question in *Ross* (Pet. App. 26a n.9).

[7]Noble seeks to rely (Pet. 20-21) on the later administrative decision in *Electric Service Co.*, TSCA Appeal No. 82-2 (EPA Jan. 7, 1985). *Electric Service Co.*, however, explicitly reaffirmed the holding of *Ross*

The "presumption" certainly was not rebutted in this case. Noble had—but studiously avoided—every opportunity to show that, in fact, its waste oil tank did not contain a concentration of PCBs in excess of 50 ppm. For one thing, Noble could have presented, but did not present, evidence to support its theory that the sample contained a higher PCB concentration than the tank as a whole because of intraliquid stratification (see Pet. App. 26a-28a). For another, EPA provided Noble with duplicates of each of the samples it took from Noble's storage tanks (*id.* at 9a), including the sample that Noble challenges here. Noble submitted no evidence on the contents of the duplicate of the challenged sample. The ALJ stated that Noble's "silence * * * could afford the basis for an inference that such evidence would be adverse to [Noble]" (*id.* at 102a n.17).[8] Given the ease with which Noble could have produced evidence that its tank was not a "PCB Container," its failure to present any such evidence is telling.[9]

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that, "even though * * * samples are not representative, they still have probative value" (*Electric Service Co.*, slip op. 17 (footnote, citing *Ross*, omitted)). The Administrator found that, on the facts of *Electric Service Co.*, "no error resulted from relying on these [grab] samples to prove the disposal violations" (*id.* at 18).

[8]If Noble had used the testing procedures recommended at 40 C.F.R. 761.10(g)(2) (1980) to test the duplicate, Noble perhaps could have argued, on equitable grounds, that EPA was required to accept Noble's results. But Noble submitted no such results.

[9]Noble devotes a few pages of its petition (at 24-27) to an argument not comprised in its "Questions Presented," namely that the ALJ abused his discretion by not reopening the record to receive additional evidence on the subject of "analytical variability." This argument is without merit. The new evidence consisted of findings from a paper that Noble's own expert witness had presented at a scientific conference in March 1982—just one month after he testified at the hearing (see Pet. App. 41a). The ALJ, after giving this evidence very thorough consideration (*id.* at 36a-105a), properly rejected it as "cumulative" (*id.* at 98a). Moreover, it was up to Noble to prepare its case in time for the

2. Noble further argues that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Environmental Defense Fund* v. *EPA, supra*, precluded EPA's administrative proceedings against Noble for violations of the disposal and marking rules. This argument is, as the ALJ stated, "patently without merit" (Pet. App. 15a).

First, the decision in *Environmental Defense Fund* v. *EPA, supra*, did not concern the disposal and marking regulations. At the outset of its opinion, the *Environmental Defense Fund* court made clear the scope of its decision: "EDF challenges * * * the so-called Ban Regulations. * * * EDF does not challenge the Disposal Regulations." 636 F.2d at 1269 n.3.

Second, even the ban regulations, with a 50 ppm threshold, remained in effect for many months after release of the opinion, because the court stayed its mandate before issuance (see 46 Fed. Reg. 27615-27621 (1981)).

Third, if the mandate had issued, Noble would have been more culpable, not less. Noble's tank would have been a "PCB Container" so long as the sample contained *any* PCBs (see p. 4 *supra*).[10] Indeed, the court set aside the 50 ppm threshold in large part because "any exposure to PCBs may have adverse effects" (676 F.2d at 1282). The ALJ accordingly stated that it would not be "logical" to allow Noble to escape administrative sanctions because the 50

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hearing or at least seek a continuance. The ALJ had no obligation to reopen the hearing in order to hear more testimony from a witness who ought to have been fully prepared when he testified the first time.

[10]40 C.F.R. 761.2(s) (1980) defined PCBs as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contain such substance" and then made reference to the 50 ppm threshold. Without the threshold limitation, the definition would have covered all PCBs.

ppm threshold was invalidated (even assuming that it was invalidated for the disposal regulations) when the basis for the invalidation was that the threshold was not protective enough of human health and the environment (Pet. App. 16a); the district court in New Jersey similarly noted that this would be "ironic" (*Noble Automotive Chemical & Oil Co.* v. *EPA*, 19 Env't Rep. Cas. at 1047).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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